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No. 969

In the Supreme Court of the United States

OCTOBER TERM, 1940.

SOUTH ATLANTIC STEAMSHIP COMPANY OF DELAWARE, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

REPLY BRIEF FOR THE SOUTH ATLANTIC STEAMSHIP COMPANY OF DELAWARE.

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We submit that the Respondent's objections to the grant of the writ of certiorari are highly technical and wholly without merit. We, therefore, respectfully request that we may be permitted to make the following answer to them:

I.

The Respondent does not deny that on October 6, 1937, the ISU was the free and unassisted bargaining agent of an appropriate group of Petitioner's employees; that on that day the ISU demanded with threat of strike that Petitioner refuse to reemploy a small minority of such group unless such minority rejoin the union to which all of the remaining members of the group belonged, and that Petitioner on the same day reluctantly yielded to such threat, first giving such minority ample notice and a sufficient opportunity to retain their jobs. But Respondent contends that Petitioner did not raise before the Board the question of its right to comply with such demand or the question of whether or not such compliance amounted to the making of "an agreement".

We submit that this is without merit. The 6th exception to the Intermediate Report (R. Vol. I 91); the 10th exception to the Intermediate Report (R. Vol. I 93); the second ground for the motion for a rehearing before the Board (R. Vol. I 160, 161, 162) which motion the Board ordered orally argued and oral argument was had (R. Vol. I 168) completely answer the Board's contention.

But if for any reason these questions were not properly presented to the Board, nevertheless the Circuit Court of Appeals was authorized in its discretion to consider them. See §10 (e) of the National Labor Relations Act cited on page 22 of

the Respondent's brief. The Circuit Court of Appeals did consider them.

The Circuit Court of Appeals stated Petitioner's contention thus: (R. Vol. I 178)

> "Petitioner yielding to this insistence and this threat * * were in effect then making an oral agreement for a closed shop."

The Circuit Court of Appeals stated the Board's contention thus: (R. Vol. I 179)

> "(3) That the refusal to sign on the 23 NMU men and the signing on the ISU men in their stead was in no sense an agreement then for a closed shop but was merely a yielding by petitioner under the threat of a strike to the unwarranted demands of the ISU."

The Court then on the same page stated:

> "We think it equally clear that the petitioner's yielding to the threat of a strike and discharging these NMU men under that threat was not intended by the parties to be nor was it the making of an oral closed shop agreement."

United States Code Annotated Title 28, §347 foot note 37, page 369 states:

> "Questions passed on by the Circuit Court of Appeals will be considered in the Federal Supreme Court on certiorari though not raised in the trial court. Friend vs Talcott (Ill. 1913) 33 S. Ct. 505, 228 U.S. 27."

II.

Waid, the ISU delegate testified (R. Vol. II 83):

> "Q. Did you say anything to them (South Atlantic Steamship Company) about your interpretation or their interpretation of the meaning of that agreement?
>
> "A. Yes, I related the phraseology of that agreement to them, that inasmuch as the crew of the Saccarappa were now NMU, that they would have to get rid of them and hire nothing but ISU men."

And on the next page (R. Vol. II 84):

> "A. Yes, that is correct, you read that paragraph to me and I interpreted it to you in the office there, that inasmuch as these men had changed to NMU, that automatically made null and void, their membership in the agreement, and therefore they were not members of the ISU and therefore, I insisted that the men must be replaced by the members of the organization."

The Board found (R. Vol. I at the bottom of page 122 and the top of page 123):

> "At the close of the entire case counsel for the Respondent moved to amend the answer to conform to the proof and to dismiss the complaint for want of substantial evidence to sustain the allegations of unfair labor practices. The first motion was granted and the second was denied."

We know of no rule of law which requires a party to cite cases or authorities in his answer or in his exceptions to an Intermediate Report. The question of construing the collective bargaining agreement as one for a closed shop was clearly presented to the Board.

The Respondent on page 15 of its brief admits that the question of construing the collective bargaining agreement according to the laws of Georgia so as to imply a closed shop was argued before the Circuit Court of Appeals. See also the second ground of the motion for rehearing filed with the Circuit Court of Appeals. (R. Vol. I 186)

The Circuit Court of Appeals in its opinion (R. Vol. I 176) stated Petitioner's contention:

> "* * that under the undisputed facts there was no discrimination and no unlawful discharge for that petitioner had a closed shop contract, either written or oral or both with the ISU * *."

And (R. Vol. I bottom of page 178 and top of page 179):

> "The Board on its part insists that the written agreement by its terms was not for a closed shop but precisely to the contrary *******; (1) that no amount of construction of a plain agreement can in law change an agreement which in terms was not for, to one for, a closed shop * *."

The Circuit Court of Appeals then held (R. Vol. I 179):

> "We have carefully examined the record in the light of these contentions and we think it quite clear that the agreement in itself was not intended to be, and cannot by construction be made into, the closed shop agreement which the law permits and provides for."

It will be seen that the question of construing the contract according to the laws of Georgia so as to imply a closed shop was fully argued, was considered by the Circuit Court of Appeals, passed upon and rejected by it.

III.

Petitioner's exceptions to the Intermediate Report No. 45 and each of its subdivisions (a) through (k) (R. Vol. I 105, 106, 107) state the reasons why the award of back pay is erroneous. We submit that these exceptions are sufficiently elaborate to cover each of the points made by the South Atlantic Steamship Company as its third ground for granting the writ of certiorari.

It must be remembered that the decision of the Board now sought to be reviewed is not the decision of the present Board. The only member of the present Board who participated in this decision is Mr. Edwin Smith. Mr. Smith's views and the views of Dr. Leiserson, a member of the present Board, are in conflict. On pages 15, 16 and 17 of our petition for the writ of certiorari and page 6 of our supporting brief we discussed this conflict as it appeared in the decision of the Cape Cod Trawling Corporation. 23 N.L.R.B. April 25, 1940. We desire to quote once more from Mr. Smith's opinion in that case:

> "It should be pointed out, also, that the position taken by the dissenting opinion gives rise to grave administrative problems. The

> necessity under which a respondent purports to act in cases such as the present one is always relative in the degree of compulsion involved. If we are to permit considerations of the sort here advanced to constitute a defense to our *usual* order of reinstatement with back pay, it might well become impossible for the Board to sift out the cases where such a defense would be justified from those where it is merely a pretext to escape liability under the Act." (Italics ours)

Mr. Smith's position in that case, the respondent's position in the Phelps Dodge case, which has been decided since the filing of this petition, and the respondent's position in this case, where it seeks to justify an award of back pay to fifteen men who did not even testify that they wished reinstatement and back pay, where it seeks to award back pay to four men who had obtained regular employment without considering whether or not such employment was "substantially equivalent", where it seeks to award back pay to one man, who admittedly went on a vacation of his own choosing, clearly demonstrates that the Board wishes to continue the practice so severely condemned by this Court in the Phelps Dodge case.

We submit that while it is possible that the old Board was in the habit of making general classifications of cases in which back pay should be awarded, it certainly refused to judge each case on its merits. It is possible that the Board exercised its judgment to determine to which class a case be-

longed, but if it did so it is also certain that once the case fell into a particular class, back pay was awarded as a matter of course, notwithstanding the fact that the particular case might have been different from every other case in its class. It is quite apparent that no classification was based upon the good faith of the employer. No classification was based upon the fact that the employer acted under compulsion. No classification was based upon the fact that the employer was the "victim of a dispute between rival labor unions" as the Circuit Court of Appeals held Petitioner was. (R. Vol. I 177). Mr. Edwin Smith stated, these were matters which were not to be considered, and notwithstanding their presence the Board's "usual order" was to be entered.

Shall that practice be continued?

As we understand the Phelps Dodge case not only is the Board prohibited from following that practice, but the Board must consider the status of each individual employee and determine whether an award of back pay to that particular individual employee is necessary to effectuate the policies of the Act. We further understand that opinion to mean that the Board cannot, as it has done in the present case, issue a blanket order and leave questions affecting the individual employee to be considered in contempt proceedings brought by the Board against Petitioner.

The majority opinion in the Phelps Dodge case stated:

> "The administrative process will best be vindicated by clarity in its exercise. Since Congress has defined the authority of the Board and the procedure by which it must be asserted and has charged the federal courts with the duty of reviewing the Board's orders (§10 (e) and (f)), it will avoid needless litigation and make for effective and expeditious enforcement of the Board's order to require the Board to disclose the basis of its order."

There is nothing in the findings of the Board which even indicates how the award of back pay will "effectuate the policies of the Act". The bald statement by the Board in its Order that the South Atlantic Steamship Company of Delaware shall "Take the following affirmative action which the Board finds will effectuate the policies of the Act", (R. Vol. I 142) has been held by this Honorable Court (See Phelps Dodge supra) not to be a suffient disclosure of the basis of an award of back pay.

Respectfully Submitted:

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